RECORD AND BRIEFS

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Nos. 16-74 & 16-86

IN THE

Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL.,
Petitioners,

v.

MARIA STAPLETON, JUDITH LUKAS,
SHARON ROBERTS, AND ANTOINE FOX,
Respondents.

SAINT PETER'S HEALTHCARE SYSTEM, ET AL.,
Petitioners,

v.

LAURENCE KAPLAN,
Respondent.

On Petitions For Writs Of Certiorari To The United States Courts Of Appeals For The Third And Seventh Circuits

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom ("ADF") is a non-profit organization devoted to the defense and advocacy of religious freedom. ADF regularly serves as counsel or *amicus curiae* in cases concerning religious liberties. Many of ADF's clients are church agencies or other religious organizations that, like Petitioners Advocate Health Care Network and Saint Peter's Healthcare System, have long maintained their pension plans as church plans. Under the Third and Seventh Circuits' decisions, these entities may be forced to alter their ecclesiastical structures or to succumb to extensive government entanglement. They may also face crippling financial penalties that would undermine or destroy their ability to carry out their religious mission. ADF thus has a substantial interest in the resolution of this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

ERISA's requirements have never applied to "church plans." *See* Pub. L. No. 93-406; *see* 29 U.S.C. §§ 1003(b)(2), 1321(b)(3); Pub. L. No. 96-364, § 407

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel for *amicus* represent that all parties were provided notice of ADF's intention to file this brief at least 10 days before its due date. Letters granting blanket consent from all parties are on file with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* certify that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

(1980 amendments expanding definition of "church plan"). ERISA defines a "church plan" as "a plan established and maintained ... for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26." 29 U.S.C. § 1002(33)(A).[2] ERISA defines "employee," in turn, to include employees of both churches themselves and tax-exempt organizations that are "controlled by or associated with a church or a convention or association of churches." *Id.* § 1002(33)(C)(ii). The statute further provides that a church plan:

> includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

Id. § 1002(33)(C)(i).

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[2] ERISA's use of the word "church" is imported from the Tax Code and thus, consistent with the Tax Code, includes temples, synagogues, mosques, and other houses of worship. *See* IRS Publication 1828, *Tax Guide for Churches and Religious Organizations*; *cf. United States v. Lamont*, 330 F.3d 1249, 1254 & n.3 (9th Cir. 2003) (using word "church" to refer to "all structures meant for religious worship, including synagogues, other temples, and mosques").

The question in these cases is whether this exemption applies to plans established by entities controlled by or associated with a church (so-called "church agencies"). For the past 30 years, the government agencies tasked with administering this exemption—the IRS and the DOL—consistently and repeatedly have concluded that the answer is "yes," prompting religious organizations like Advocate and Saint Peter's to maintain their plans in good-faith reliance on those agencies' guidance.

The Third and Seventh Circuits nevertheless upset the settled expectations of countless religious entities and held that their plans fall outside the scope of ERISA's exemption because they were not established directly by a house of worship. In addition to being contrary to the text and structure of the statute, that interpretation of ERISA raises serious constitutional concerns. Those concerns are exacerbated by the staggering financial penalties that religious organizations may face as a result of the decisions below—penalties that threaten to cripple the ability of countless charities to carry out their religious missions. This Court should intervene now, before it is too late.

ARGUMENT

THE FIRST AMENDMENT FAVORS INTERPRETING ERISA'S "CHURCH PLAN" EXEMPTION TO INCLUDE PETITIONERS' PLANS

It is a "cardinal principle" of statutory construction that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *Edward J.*

DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). Accordingly, "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court's] plain duty is to adopt that which will save the act." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895).

This Court has consistently applied these principles to construe statutes in a manner that avoids "infring[ing] [upon] constitutionally protected liberties." *DeBartolo*, 485 U.S. at 575. For example, in *Catholic Bishop*, the Court acknowledged that the language of the National Labor Relations Act was "very broad," but nevertheless refused to apply it to teachers working in church-operated schools. 440 U.S. at 504; *see id.* at 507. Doing so, the Court explained, would present "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 507. This Court has followed the same approach in other cases. *See, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2093 (2014) (construing statute to avoid disruption to constitutional balance between state and federal power); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983) (rejecting rational interpretation of statute that would infringe upon First Amendment rights and state interests).

This fundamental rule counsels in favor of construing ERISA's exemption to include Petitioners'

plans. An interpretation that exempts plans maintained by entities controlled by or associated with houses of worship—which courts and government agencies have found reasonable for over 30 years—protects such church agencies' First Amendment rights. The Third and Seventh Circuits' restrictive interpretation of the exemption, by contrast, impermissibly infringes upon these rights—a concern that is exacerbated by the crippling financial penalties that those decisions threaten to impose.

A. Congress Enacted A Broad "Church Plan" Exemption To Protect The First Amendment Rights Of Religious Entities

Religious entities have provided retirement benefits to their workers for centuries. For example, in 1717, the Presbyterian Church in Philadelphia established a "Fund for Pious Uses" intended to provide financial assistance to ministers and their families. R. Douglas Brackenridge & Lois A. Boyd, *Presbyterians and Pensions: The Roots and Growth of Pensions in the Presbyterian Church (U.S.A.)* 7 (1988). Similarly, the Methodist Church established the "Preacher's Fund" in 1763 to provide for the needs of "old or sickly preachers and their families," as well as "for the widows and children of those that are dead." 2 Luke Tyerman, *The Life and Times of the Rev John Wesley, M.A., Founder of the Methodists* 772 (1998). These funds were often inextricably related to the church's religious mission; indeed, the Presbyterian Church "pledged financial support so that ministers could devote all their energy to ecclesiastical duties." Brackenridge & Boyd, *supra*, at 7. By providing financial assistance to ministers'

widows and children, churches sought to ensure that their ministers would provide "forceful leadership" throughout their lives. *Id.*

By the time ERISA was enacted in 1974, houses of worship had been providing pension benefits for nearly 300 years. Congress recognized that imposing ERISA's requirements on these entities, including "the examination[] of books and records," "might be regarded as an unjustified invasion" of "churches and their religious activities." S. Rep. No. 93-383, at 81 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4695. In light of these serious First Amendment implications, Congress included a provision exempting church plans from ERISA's requirements. *See* 29 U.S.C. § 1003(b)(2).

Congress's concerns were well-founded. "[R]eligious freedom encompasses the power of religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 721-22 (1976) (internal quotation marks omitted). The First Amendment's Religion Clauses thus prohibit the government from "interfer[ing] with the internal governance of the church" and "protect[] a religious group's right to shape its own faith and mission." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012). This freedom includes the freedom to make "internal church decision[s]." *Id.* at 707.

Congress was rightly concerned that trolling through religious entities' records or forcing them to make decisions about the funding of their pension

plans would impermissibly invade these entities' constitutional rights. *See* S. Rep. No. 93-383, at 81, 1974 U.S.C.C.A.N. at 4965; 125 Cong. Rec. 10052 (1979); *cf. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring) ("[The] prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity."). Moreover, ERISA's requirements apply only when an employer *chooses* to provide a benefits plan. Synagogues, mosques, churches, and other houses of worship should not be forced to decide between ceasing to provide retirement benefits and subjecting themselves to extensive government regulation of their internal operations. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefits plans."). The First Amendment protects religious entities from having to make such a choice. *See, e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 706; S. Rep. No. 93-383, at 81, 1974 U.S.C.C.A.N. at 4965.

These same considerations apply to the *agencies* of churches, synagogues, mosques, and other houses of worship. Indeed, "[c]hurch agencies are essential to the churches' mission[s]" and "are, in fact, part of the churches." 125 Cong. Rec. 10052 (Sen. Talmadge). And Congress amended the church plan exemption in 1980 to ensure that such entities would be able to avoid invasive regulation under ERISA. As Senator Talmadge, a co-sponsor of the amendment, explained, "If we have enacted a statute that may require the church plans to come under ERISA, file reports, [and] be subject to the

examination of books and records ... it must be changed because we have clearly created an excessive Government entanglement with religion." *Id.* (without a broad church plan exemption, "ministers and lay employees will not be able to pursue their missions nearly as freely as they have in the past").

For these reasons, construing ERISA's exemption to include plans established by church agencies effectuates Congress's purpose in enacting the amendment and protects religious entities' First Amendment rights. This interpretation is eminently reasonable, as reflected by decades of court decisions and administrative agency opinion letters that have concluded that plans established by agencies of houses of worship are exempt from ERISA. *See, e.g.*, *Thorkelson v. Publ'g House of the Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1125 (D. Minn. 2011); *Rinehart v. Life Ins. Co. of N. Am.*, No. C08-5486, 2009 WL 995715, at *3 (W.D. Wash. Apr. 14, 2009); *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77, 85-86 (D. Me. 2004); IRS Gen. Counsel Mem. 39,007, 1983 WL 197946, at *1, 5-6 & n.1 (July 1, 1983); DOL Advisory Op. 94–04A (Feb. 17, 1994); I.R.S. P.L.R. 9446037, 1994 WL 648763 (Nov. 18, 1994).

B. The Interpretation Adopted By The Decisions Below Violates The First Amendment's Religion Clauses

The contrary holdings of the Third and Seventh Circuits—that ERISA does not exempt plans established by church agencies—"give rise to serious constitutional questions" that warrant this Court's review. *Catholic Bishop*, 440 U.S. at 501.

First, by limiting the exemption to plans established by churches, the Third and Seventh Circuits' interpretation impermissibly interferes with a religious entity's "internal governance" and "right to shape its own faith and mission." *Hosanna-Tabor*, 132 S. Ct. at 706. This freedom includes the ability to make "internal church decision[s]" such as whether the church prefers one of its agencies to establish and maintain a benefits plan. *See id.* at 707. For various reasons—including ones pertaining to ecclesiastical doctrine—a church, synagogue, or mosque may establish its agencies as separate entities. By excluding plans established by such church agencies from ERISA's exemption, the interpretation adopted by the decisions below would impermissibly force houses of worship to choose between reorganizing themselves—potentially in a way that is inconsistent with their beliefs—and jeopardizing their agencies' ability to provide for retired employees. The Free Exercise Clause prohibits this intrusion upon "a religious group's right to shape its own faith and mission." *Id.* at 706.

Second, and relatedly, the decisions below adopt an interpretation that violates "[t]he clearest command of the Establishment Clause": "that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). In *Larson*, this Court invalidated a statute imposing certain requirements on religious organizations that received more than half of their funding from non-members. *Id.* at 255. The statute, *Larson* explained, impermissibly distinguished between "well-established churches" with strong financial support from their members and "churches

which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members." *Id.* at 246 n.23 (internal quotation marks omitted).

The Third and Seventh Circuits' interpretation of the church plan exemption runs afoul of the Establishment Clause for the same reason. Whether or not a house of worship establishes a plan for its agencies' employees often hinges on whether it belongs to a congregational or hierarchical denomination. *See* 125 Cong. Rec. 10052 (Sen. Talmadge). By extending ERISA's exemption to some church agencies (*i.e.*, those whose plans are established by a house of worship) and denying it to others (*i.e.*, those whose plans are established by either the agency itself or a church's national pension board), the Third and Seventh Circuits' holdings impermissibly discriminate between denominations.

Third, the interpretation adopted by the decisions below will require courts to engage in constitutionally suspect inquiries into whether an entity is sufficiently religious to be considered a "church" or equivalent house of worship. Indeed, before Congress expanded ERISA's exemption in 1980, the IRS did just that. *See, e.g.*, IRS Gen. Counsel Mem. 37,266, 1977 WL 46200, at *3-6 (Sept. 22, 1977) (analyzing eligibility of Catholic nun order by examining the religious nature of the organization's primary activities). But "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee

against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977); *see Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) ("It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs."); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). Not only would this process "result[] in considerable ongoing government entanglement in religious affairs," *Amos*, 483 U.S. at 343 (Brennan, J., concurring); *see also Catholic Bishop*, 440 U.S. at 502; it also would favor overtly devout religious organizations over those that appear less orthodox, violating the Establishment Clause's command of neutrality, *see Larson*, 456 U.S. at 244. The Third and Seventh Circuits' narrow interpretation thus resurrects the constitutional problems that Congress acted in 1980 to correct.

Finally, on top of all of these concerns, religious organizations may face staggering financial penalties as a result of the decisions below. Collectively, Respondents allege that Petitioners owe over $4 billion to 37,700 putative class members. Those penalties threaten to cripple the ability of countless charities to carry out their religious missions. That harm cannot be undone later; this Court should intervene now.

CONCLUSION

For the reasons stated above, the petitions for writs of certiorari should be granted.

Respectfully submitted,

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